IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2008 MTWCC 33

WCC No. 2007-2018

DAVID TINKER

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Appealed to Montana Supreme Court - 09/02/08
Cross Appeal Filed by Petitioner - 09/11/08

Summary: On July 24, 2007, Petitioner sought medical treatment for hip and knee pain. He related the pain to a slip and fall incident at work which had occurred two or three years earlier, but he did not seek treatment because he believed the injury would heal itself. X-rays revealed that Petitioner had severe degenerative hip disease in his left hip. Petitioner filed claims for an industrial injury and occupational disease. Respondent denied his occupational disease claim since his condition could be attributed to a single incident on a specific date, and declined his industrial injury claim as untimely.

Held: Petitioner's claim that he suffered an occupational disease is denied because he never reached MMI from his industrial injury prior to his hip condition allegedly being aggravated by his work. Under § 39-71-601(1), MCA, a claimant must file a claim for benefits within 12 months of the industrial accident. Section 39-71-601(2), MCA, provides that insurers may waive the time requirement up to an additional 24 months upon a reasonable showing by the claimant of lack of knowledge of disability, latent injury, or equitable estoppel. In the present case, Petitioner did not suffer a disability until he could no longer perform his job duties. Therefore, the time requirement is waived under § 39-71-601(2)(a), MCA, and his claim is not time-barred.

¶ 1 The trial in this matter was held on May 29, 2008, in Great Falls, Montana. Petitioner David Tinker was present and was represented by Richard J. Martin. Respondent was represented by Greg E. Overturf.

¶ 2 Exhibits: Exhibits 1 through 11 and 13 were admitted without objection, except pages 160-164 of Exhibit 11, which contained the mediation report and recommendation and were removed from the record. Respondent withdrew its objection to Exhibit 12 and it was admitted.

¶ 3 Witnesses and Depositions: The depositions of Petitioner and Dr. Ronald M. Peterson were taken and submitted to the Court, and can be considered part of the record. Petitioner was sworn and testified at trial.

¶ 4 Issues Presented: The Pretrial Order states the following contested issues:

> ¶ 4a Whether Petitioner is entitled to acceptance of his workers' compensation claim for either his occupational disease or his injury claim for his left hip condition.
>
> ¶ 4b Whether an attorney fee, costs, and penalty should be awarded.[1]

FINDINGS OF FACT

¶ 5 Petitioner testified at trial. I find Petitioner to be a credible witness.

¶ 6 Petitioner began working for Haman Construction in approximately 1989. His job duties included being a foreman, laborer, and form setter. He is currently not working because of a back injury which is not related to the present case before the Court.[2] During the time Petitioner worked for Haman Construction, the company did primarily concrete work.[3]

¶ 7 On July 24, 2007, Petitioner sought medical care because of pain in his hip and knee. He went to a walk-in clinic in Great Falls to get a referral for his hip because he

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[1] Pretrial Order at 2.

[2] Trial Test.

[3] Tinker Dep. 8:3-7.

does not have a family doctor and has no health insurance. Petitioner testified that he has seen a doctor only on rare occasions.[4]

¶ 8 Petitioner testified that he had sharp pains in his hip and knee which prevented him from sleeping at night and which limited his ability to do his job because he could not walk around the job sites. Prior to July 24, 2007, Petitioner had never sought medical treatment for his hip and knee pain, but he had experienced intermittent hip and knee pain for some time before then.[5]

¶ 9 At the clinic, Petitioner was seen by Dr. Loy L. Anderson. Dr. Anderson reported that Petitioner had come in for an evaluation of his chronic hip and knee pain, which he indicated had started with an injury which had occurred two or three years previously. Petitioner had slipped and fallen on oiled concrete forms. Dr. Anderson noted that Petitioner had experienced pain since that incident but did not seek medical treatment until the pain became so severe that he had difficulty walking.[6] After Dr. Anderson reviewed x-rays of Petitioner's hip, she determined he had severe degeneration which might require a hip replacement.[7] A radiology report from July 24, 2007, indicates that Petitioner had severe degenerative changes to his left hip.[8]

¶ 10 Petitioner explained that he had a particular incident in mind when he described the onset of his hip pain. While Petitioner has slipped and fallen on the job on different occasions, on this one particular occasion, he slipped on oil and fell hard on his left side. Petitioner rested briefly after his fall and then finished his work shift. He mentioned the fall to his boss.[9] Petitioner did not seek medical treatment after his fall. He explained that he does not tend to be a "complainer" and that he could not afford to take time off work. He believed it would heal itself over time.[10]

¶ 11 Petitioner explained that from the day of that fall forward, he had pain in his hip that would come and go. The pain would alleviate during slow work times and would increase

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[4] Trial Test.

[5] Trial Test.

[6] Ex 5:1.

[7] Ex. 5:4.

[8] Ex. 4:1.

[9] Trial Test.

[10] Trial Test.

when he worked longer hours. Petitioner testified that whenever he would have pain in his hip, in his mind he related it back to that particular slip and fall. Petitioner further testified that sometimes the pain in his hip would increase to the point where it slowed him down at work and limited how much he could lift. In spite of his hip pain, he always kept working. Petitioner continued in the same job position and with the same job duties as he had in June 2005. By the beginning of 2007, the pain had increased to the point where he had difficulty getting in and out of a vehicle and he began to have difficulty performing his job.[11]

¶ 12 Petitioner saw Dr. Anderson for a follow-up appointment on August 23, 2007. Dr. Anderson noted that x-rays which were taken during Petitioner's July 24, 2007, appointment did not reveal anything in his knee, but showed severe degenerative changes in his left hip. Dr. Anderson opined that Petitioner's degenerative hip condition was likely caused by his industrial accident.[12]

¶ 13 After Dr. Anderson informed Petitioner that he needed a hip replacement, Petitioner continued working at Haman Construction. He decided to pursue a workers' compensation claim.[13] Petitioner called Respondent and explained that he wanted to file a claim for his hip. He spoke with an adjuster and they jointly decided to list his date of injury as June 15, 2005, because Petitioner recalled that as the approximate time when he had the slip and fall accident at work.[14] Petitioner signed a First Report on August 10, 2007, in which he listed the date of injury as June 15, 2005, and described the accident as:

> Setting foundation. Slipped on some oiled forms, did the splits, then fell, hurting my hip. Didn't think too much about it at the time until the hip started bothering me to the point I had to see the doctor. Didn't see a doctor until July 24, 2007.[15]

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[11] Trial Test.

[12] Ex. 3 to Petitioner's Dep.

[13] Trial Test.

[14] Trial Test.

[15] Ex. 1 to Tinker Dep.

Petitioner noted that he worked his next scheduled shift and did not take any time off of work after the accident.[16] Within a week of filing his claim, Petitioner heard from Respondent that his claim was being denied for being untimely.[17]

¶ 14 Petitioner filed another First Report of Injury and Occupational Disease, which he signed on August 28, 2007, and which indicated that he had suffered an occupational disease of his hips with an injury date of July 24, 2007.[18] Petitioner believes the description of his industrial accident as written on his August 10, 2007, First Report is accurate.[19]

¶ 15 Ronald M. Peterson, M.D., conducted an independent medical examination (IME) of Petitioner on February 20, 2008.[20] Dr. Peterson obtained the information he put in the summary section of his report by interviewing Petitioner.[21] He understood that Petitioner had periods of no pain in his left hip after the June 2005 industrial accident. Dr. Peterson stated that he did not put this in the IME report "in specific words" because he believes it is implicit in Petitioner's description that the pain would "come and go."[22]

¶ 16 Dr. Peterson opined that Petitioner's left hip condition started with the June 2005 fall. Dr. Peterson stated that it was unlikely that Petitioner's hip condition was caused by an inflammatory disease such as rheumatoid arthritis because it was unilateral. Dr. Peterson concluded that Petitioner's hip condition was traumatic osteoarthritis secondary to a fall.[23] He opined that Petitioner would not have this hip condition but for his June 2005 industrial accident.[24] He further opined that Petitioner's condition progressed as rapidly as it did because of the heavy-duty nature of his job.[25] Dr. Peterson recommended that

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[16] Trial Test.; Tinker Dep. 18:17-21.

[17] Trial Test.

[18] Ex. 5 to Petitioner's Dep.; Ex. 2.

[19] Trial Test.

[20] Peterson Dep. 5:1-10.

[21] Peterson Dep. 7:18-25.

[22] Peterson Dep. 9:14-24.

[23] Peterson Dep. 17:8 - 18:7.

[24] Peterson Dep. 19:24 - 20:5.

[25] Peterson Dep. 19:12-23.

Petitioner receive a total hip joint replacement.[26] He opined that Petitioner's need for a hip replacement is due to the natural progression of this June 2005 industrial injury.[27]

¶ 17 In his IME report, Dr. Peterson opined:

> Based on [Petitioner's] history, review of his medical records, and his physical examination today, on a more-probable-than-not basis, I believe that his left [hip][28] condition (severe osteoarthritis of the joint with joint deterioration) started with his fall in or about June of 2005. Unfortunately, we have no medical records to review at that period of time, because by [Petitioner's] own history, he was "not a complainer", continued working and slowly developed symptomatology of left hip pain. I think the fact that he has unilateral hip disease makes it very improbable that this is due to an inflammatory condition with systemic effects. I think the condition is much more consistent with traumatic osteoarthris [sic] secondary to this fall. Because of the nature of his work, I believe that [Petitioner's] osteoarthritis of the left hip advanced quickly to the point where he virtually has no joint space left.[29]

CONCLUSIONS OF LAW

¶ 18 This case is governed by the 2005 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Petitioner's industrial accident.[30]

¶ 19 Petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.[31]

¶ 20 The basic facts of this case are not in dispute. No one disputes Petitioner's account of his June 2005 industrial accident or his subsequent symptoms. The medical records

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[26] Peterson Dep. 19:8-11.

[27] Peterson Dep. 20:6-9.

[28] Dr. Peterson's IME report states, "left knee condition." However, during his deposition he clarified that this was a typographical error and should have read "left hip condition." Peterson Dep. 16:22 - 17:5.

[29] Ex. 13 at 4.

[30] *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

[31] *Ricks v. Teslow Consol.,* 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

and medical testimony are not contradictory. The controversy lies in whether Petitioner's hip condition is compensable as either an industrial injury or an occupational disease. Respondent denied Petitioner's occupational disease claim on the grounds that Petitioner's hip condition arose from a specific incident on a specific date. Respondent denied Petitioner's industrial injury claim because Petitioner did not file a claim within 12 months as required by § 39-71-601, MCA. Petitioner argues that this Court should find his claim compensable, either as an occupational disease or by determining that the claims filing period is waived because he meets one of the exceptions set forth in § 39-71-601(2), MCA.

Petitioner's Occupational Disease Claim

¶ 21 "'Occupational disease' means harm, damage, or death arising out of or contracted in the course and scope of employment caused by events occurring on more than a single day or work shift."[32]

¶ 22 Petitioner has argued that his hip condition should be treated as an occupational disease because the medical evidence demonstrates that his hip deteriorated more quickly because of the heavy-duty labor he performed for his employer. As Respondent points out, the difficulty with Petitioner's position is that no evidence demonstrates that he ever reached maximum medical improvement (MMI) after his June 2005 industrial injury. The incident which caused Petitioner's hip condition occurred in a single event on a single day, thereby satisfying the definitions of "injury" and "accident" found in § 39-71-119, MCA.

¶ 23 This Court and the Montana Supreme Court have consistently held that in cases where a claimant suffers an alleged subsequent injury or aggravation to a preexisting condition, the insurer at the time of the second injury only escapes liability if the claimant had not reached MMI from the previous injury. Conversely, the insurer at risk at the time of the first injury only escapes liability if the claimant ***had*** reached MMI from the previous injury.[33] Even though the same insurer was at risk for both Petitioner's alleged industrial injury and his alleged subsequent occupational disease, I see no cause to distinguish his case on this point alone, as the facts of Petitioner's case remain the same regardless of whether it was a single insurer or not. Since no evidence indicates that Petitioner ever reached MMI from his industrial injury, any subsequent progression of that injury is attributable to the initial injury and Petitioner therefore does not have a viable occupational disease claim.

Petitioner's Injury Claim

¶ 24 Alternatively, Petitioner argues that his claim should be accepted as an injury, and that he should not be time-barred from pursuing his claim because he did not seek medical treatment and learn that he might have a compensable injury until July 24, 2007.

¶ 25 Under § 39-71-601(1), MCA, a claim for benefits for an industrial injury must be made within 12 months of the accident. Section 39-71-601(2), MCA, provides that the

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[32] § 39-71-116(20)(a), MCA.

[33] *See, e.g.*, *Hunter v. Hartford Ins. Co. of the Midwest*, 2007 MTWCC 13; *Stacks v. Travelers Property Cas.*, 2001 MTWCC 9; *Perry v. Tomahawk Transp.*, 226 Mont. 318, 735 P.2d 308 (1987); *Belton v. Carlson Transport*, 202 Mont. 384, 658 P.2d 405 (1983).

insurer may waive the time requirement for up to an additional 24 months upon a reasonable showing by the claimant of lack of knowledge of disability; latent injury; or equitable estoppel. Notwithstanding the language in the statute which appears to vest the insurer with the sole discretion to waive the time requirement, this Court has previously noted that "[Section 39-71-601(2), MCA] required claimant to submit [a] written claim for compensation within twelve months unless ***the Court*** finds grounds under section 39-71-601(2), MCA, for waiving the requirement."[34] Waiver of the time requirement is not discretionary if the claimant would otherwise qualify for waiver under the statute.

¶ 26 As this Court has previously noted, the statutory provision for a waiver based on a lack of knowledge of disability has been a part of the workers' compensation code since 1973. Case law added latent injury and equitable estoppel as grounds for tolling the one-year limitations period, and those additions were codified in 1989.[35]

¶ 27 Respondent correctly points out that the elements of equitable estoppel are not met in this case. No facts are in evidence which would fulfill the six elements which must be met for equitable estoppel to occur.[36] Therefore, the time limit for filing Petitioner's claim is not extended under § 39-71-601(2)(c), MCA.

¶ 28 Respondent further argues that Petitioner did not have a latent injury because he knew at the time of his industrial accident that he had suffered an injury. In *McGuin v. State Compen. Ins. Fund,*[37] this Court – noting that the Montana Supreme Court has held that the one-year filing requirement of § 39-71-601, MCA, is tolled "until the claimant, as a reasonable man, should recognize the nature, seriousness and probable, compensable character of his latent injury,"[38] – stated "'Latent' means hidden or invisible."[39] In *McGuin*, where the claimant suffered ear ache and balance problems for years without relating them

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[34] *Scozzari v. MSGIA*, 2004 MTWCC 7, ¶ 27. (Emphasis added.) See also, *Ingraham v. Champion Int'l*, 243 Mont. 42, 48, 793 P.2d 769, 772 (1990). (Legislature may not delegate legislative authority to a nonlegislative body such as an insurance company.) In the instant case, Montana State Fund also acknowledged that it neither believed nor was it asserting that it had the discretion to deny the extension if Petitioner met one of the exceptions set forth in the statute. (Minute Book Hearing No. 3948.)

[35] *Bain v. Liberty Mutual Fire Ins. Co.*, 2004 MTWCC 45, ¶ 126 (aff'd 2005 MT 299N). (Citations omitted.)

[36] *See Wiard v. Liberty Northwest Ins. Corp.*, 2003 MT 295, ¶ 36, 318 Mont. 132, 79 P.3d 281. (Citations omitted.)

[37] *McGuin*, 1999 MTWCC 82

[38] *McGuin*, ¶ 55 (*citing Bowerman v. Employment Security Comm'n*, 207 Mont. 314, 319, 673 P.2d 476, 479 (1983)).

[39] *McGuin*, ¶ 55.

to a particular incident, this Court concluded that his injury was a latent injury. This is readily distinguishable from the present case in which Petitioner admitted that he always related his hip and knee pain back to his June 2005 industrial accident. While Petitioner may not have been aware of the severity of his injury, the injury itself was not "hidden or invisible." Therefore, the one-year time limitation is not tolled under the latent injury exception of § 39-71-601(2)(b), MCA.

¶ 29 Under § 39-71-601(2)(a), MCA, the time requirement may be waived for up to 24 months if the claimant has a "lack of knowledge of disability." In *Pinion v. H.C. Smith Constr. Co.,*[40] the Montana Supreme Court affirmed this Court's ruling that the claimant was entitled to a waiver of the one-year period for filing a claim for compensation because the Court found he was unaware that his industrial accident had caused him to suffer a disability until more than a year after the accident occurred. In *Pinion*, the claimant stepped into a hole and injured his knee and back on May 31, 1978. He reported the accident to his supervisors. However, he continued working and a few months later left the state for another job. Although the claimant self-treated, he did not seek medical care or file a workers' compensation claim because he believed his knee and back problems would resolve. The claimant returned to Montana and sought medical treatment in August 1979. An orthopedic surgeon recommended knee surgery. At that point, Pinion was unable to work. He filed a workers' compensation claim on September 17, 1979, more than a year after his industrial accident.[41]

¶ 30 At that time, § 39-71-601(2), MCA, provided an exception to the statutory one-year claim filing limitation ***only*** upon a reasonable showing by the claimant of lack of knowledge of disability.[42] The Supreme Court concluded that substantial credible evidence supported this Court's conclusion that Pinion lacked knowledge of his disability until he sought medical treatment.[43]

¶ 31 *Conn v. Quality Inn*[44] was also decided utilizing pre-1989 revisions to § 39-71-601(2), MCA, when the only exception to the one-year claim filing limitation was lack of knowledge of disability. In *Conn*, the claimant injured her back and hip twice in tripping incidents which occurred on the job sometime in early 1986, and on June 22, 1987,

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[40] *Pinion,* 190 Mont. 103, 619 P.2d 167 (1980).

[41] *Pinion,* 190 Mont. at 104, 619 P.2d at 167.

[42] *See* ¶ 28, above.

[43] *Pinion,* 190 Mont. at 105, 619 P.2d at 168.

[44] *Conn*, 242 Mont. 190, 789 P.2d 1213 (1990).

respectively. Conn did not miss work after either incident, but she suffered sporadic pain which increased following the second industrial accident. Conn sought medical treatment shortly after the June 22, 1987, accident. The treatment was initially successful, and Conn apparently did not file a workers' compensation claim until November 1988, when she experienced an increase in symptoms and quit her job on her doctor's advice. Conn acknowledged that her claims were not filed within 12 months of her industrial injuries; however, she argued that she was entitled to a waiver under § 39-71-601(2), MCA, because although she knew she was injured, she did not know she had suffered a disability until her doctor advised her to quit her job.[45]

¶ 32 In determining whether this Court correctly interpreted the law when it concluded that Conn did not have knowledge that she had suffered a disability until her doctor advised her to quit her job, the Montana Supreme Court looked to the 1985 version of the Workers' Compensation Act to determine what would constitute a "disability" as used in § 39-71-601(2), MCA. The Supreme Court stated:

> The present question is, what did the legislature intend when it used the term "disability" in § 39-71-601(2), MCA (1985)? Legislative intent is determined by first looking to the plain meaning of the statutes. The Workers' Compensation Court appropriately looked to the legislature's statutory definition of "disability."[46]

The Supreme Court then examined the use of the word "disability" in the Workers' Compensation Act (WCA or Act), including the definitions of temporary total disability, permanent total disability, and permanent partial disability. It emphasized that all of the definitions contained language to the effect that the injury caused a loss of wages or loss of earning capability. The Supreme Court then agreed with this Court that, although the claimant knew she had been injured on the job at the time of her industrial accident, she had no knowledge of her disability until her ability to earn undiminished wages occurred when her doctor advised her to quit her job.[47]

¶ 33 Respondent also points out that both *Pinion* and *Conn* were decided under previous versions of the WCA, when § 39-71-104, MCA, provided that the Act be construed liberally in favor of the injured worker. While it is clear that the Supreme Court relied on the liberal

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[45] *Conn*, 242 Mont. at 191, 789 P.2d at 1213-14.

[46] *Conn*, 242 Mont. at 192, 789 P.2d at 1214. (Citation omitted.)

[47] *Conn*, 242 Mont. at 192-93, 789 P.2d 1214-15.

construction of the statutes in its finding in *Pinion*, I see no evidence that the liberal construction statute played any role in the Supreme Court's decision in *Conn*.

¶ 34 The Act has since undergone extensive legislative revisions. Section 39-71-104, MCA, has been repealed, and in 1995, the legislature moved the definition of "disability" from § 39-71-116(9), MCA, where it defined the term for the entire chapter, to § 39-71-116(29)(b), MCA,[48] where it defines the term only as it pertains to "secondary medical services." At the same time, the Legislature revised the statutory definition of "disabled worker" found at § 39-71-1011(2), MCA.

¶ 35 In the current statutes, "disabled worker," as defined in § 39-71-1011(2), MCA, means a worker who has a permanent impairment, established by objective medical findings, resulting from a work-related injury that precludes the worker from returning to the job the worker held at the time of the injury or to a job with similar physical requirements and who has an actual wage loss as a result of the injury. Prior to 1995, the definition of "disabled worker" did not require a permanent impairment established by objective medical findings, nor did it require an actual wage loss.

¶ 36 Today, the WCA does not have a general definition of "disability." The definition which was previously a stand-alone definition in § 39-71-116, MCA, is now under § 39-71-116(30)(b), MCA, just as it was under the 2005 statutes which control the present case. Section 39-71-116(30)(b)(i), MCA, cautions that its definition of "disability" is meant to be used to define "disability" within the definition of § 39-71-116(30), MCA, as to "secondary medical services." In § 39-71-116(30)(b)(i), MCA, "disability" is defined as:

> a condition in which a worker's ability to engage in gainful employment is diminished as a result of physical restrictions resulting from an injury. The restrictions may be combined with factors, such as the worker's age, education, work history, and other factors that affect the worker's ability to engage in gainful employment.

¶ 37 It is unclear from the legislative history exactly why the general definition of disability was moved from a stand-alone definition to a definition applying only to "secondary medical services." What is clear, however, is that the legislature made a concerted effort to revise ***all*** the statutes which reference some sort of "disability" so that they require a wage loss or inability to perform one's time-of-injury job as an element of each definition. Although the precise language of the statutes has changed since *Pinion* and *Conn* were decided, the statutes which reference "disability" all still indicate that loss

[48] Now § 39-71-116(30)(b), MCA.

of wages or loss of earning ability is necessary for a worker to be considered to have a "disability" under the Act.

¶ 38 The facts of this case are that Petitioner had a slip and fall accident at work. Petitioner testified that slip and fall accidents were a fairly common occurrence in his work environment. While this particular slip and fall stood out in his mind and he informed his boss about the accident when it occurred, Petitioner did not miss any work as a result of this accident, and he assumed that the residual aches and pains he felt would heal on their own. Petitioner only sought medical treatment when his pain reached a level where he discovered that he had difficultly performing his job duties. In other words, he sought medical treatment when his ability to engage in gainful employment was diminished as a result of physical restrictions resulting from his industrial injury. I conclude that Petitioner lacked knowledge of his disability until July 24, 2007, when he sought medical treatment because his injury prevented him from performing his job duties. Petitioner's claim for compensation therefore qualifies for the waiver of the time limitation found at § 39-71-601(2), MCA, and is compensable under the Act.

Costs, Attorney Fees, and Penalty

¶ 39 As the prevailing party, Petitioner is entitled to his costs.[49] As to the issue of attorney fees, pursuant to § 39-71-611, MCA, an insurer shall pay reasonable attorney fees if the insurer denies liability for a claim for compensation, the claim is later judged compensable by this Court, and this Court determines the insurer's actions in denying liability were unreasonable. In the present case, although Petitioner has prevailed on his industrial injury claim, I do not find Respondent to have been unreasonable in denying liability. Petitioner did not file a claim for benefits within one year of his industrial accident and his qualification for one of the time extensions under § 39-71-601(2), MCA, was not clear cut.

¶ 40 Similarly, pursuant to § 39-71-2907, MCA, I may increase by 20% the full amount of benefits due a claimant during the period of delay or refusal to pay if the insurer's delay or refusal to pay is unreasonable. As I have not found Respondent's refusal to pay benefits to have been unreasonable under the facts of this case, I decline to award a penalty under § 39-71-2907, MCA.

JUDGMENT

[49] *Marcott v. Louisiana Pac. Corp.*, 1994 MTWCC 109 (*aff'd after remand at* 1996 MTWCC 33).

¶ 41 Petitioner is entitled to acceptance of his workers' compensation claim for his injury claim for his left hip condition.

¶ 42 Petitioner is entitled to his costs.

¶ 43 Petitioner is not entitled to attorney fees.

¶ 44 Petitioner is not entitled to a 20% penalty.

¶ 45 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED in Helena, Montana, this 7th day of July, 2008.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Richard J. Martin
Greg E. Overturf
Submitted: May 29, 2008